

IN THE UNITED STATES
PATENT AND TRADEMARK OFFICE

Patent Application

Inventor(s): Ronald Van Haalen et al.

Serial No.: 10/621,060

Filed: 07/16/2003

Case: ALU/vanHaalen

Examiner: Moore, Ian N.

Group Art Unit: 2416

Confirmation #: 8826

Title: Communication Network Comprising At Least A Source And A Switch
for Receiving and Forwarding Data Packets Originated By The Source

**MAIL STOP APPEAL BRIEF-PATENTS
COMMISSIONER FOR PATENTS
P.O. BOX 1450
ALEXANDRIA, VA 22313-1450**

SIR:

REPLY BRIEF

Appellant submits this Reply Brief to the Board of Patent Appeals and Interferences in response to the Examiner's Answer, dated October 14, 2009, in the Appeal of the above-identified application.

The Commissioner is authorized to charge any fees due, including extension of time and excess claim fees, to counsel's Deposit Account No. No. 50-4802/ALU/Van Haalen.

Section 10 (Response to Arguments)

Claim 1

In Section 10 (Response to Arguments) of the Examiner's Answer, the Examiner provides answers to the arguments made by the Appellants in the Appeal Brief filed for the above-identified application. The Examiner's answers to Appellants' arguments are addressed below.

In Section 10 (Response to Arguments), the Examiner refers to FIG. 1, 2 and cites col. 5, lines 9-30, 50-65; col. 6, lines 30-60; col. 8, lines 40-50 for the proposition that Boduch discloses the switch configured to discard or accept data packets depending on the source from which the data packets originate. Appellants urge to the contrary.

Boduch does not teach "expressly" or "inherently" discard or accept data packets depending on the source from which the data packets originate, because Boduch's interest lies elsewhere. The distinction between the claimed embodiments and Boduch is acute. The claimed embodiments prevent re-ordering of data packets (See page 3, lines 1-3) whereas Boduch's main concern is data integrity (See col. 3, lines 14-20).

Specifically, Boduch discloses:

"If a cell is missing from all the multiple redundant switch network copies, idle bytes are used to compensate for the missing data. See col. 2, lines 44-46.

This notion is repeated throughout Boduch. For example, in col. 4, lines 33-40, Boduch discloses:

"If any cells required to construct the outgoing data stream are missing from both networks, the best cell copy selection ASIC 110 inserts idle filler bytes, consisting, for example, of alternating '1' and '0's, to compensate for the missing data."

Based on the above, it is apparent that Boduch cannot tolerate missing data packets, because Boduch's main concern is ensuring data integrity and minimizing the amount of data that may be dropped as bad. (See col. 3, lines 17-18). Hence, when Boduch drops a cell it is because the cell is bad as opposed to the source from which the data packets originate as claimed in Appellants' claim 1. (emphasis added).

Further, the Examiner cites col. 2, lines 18-32; col. 3, lines 14-19; col. 5, lines 60-67; col. 6, lines 30-41, 45-56; col. 7, lines 7-15, 33-44; col. 8, lines 35-40 contending that Boduch discloses: "data packets received at the first input port are discarded for a period of time." (emphasis added). Appellants urge to the contrary.

First, the phrase “data packets received at the first input port are discarded for a period of time” is taken out of context. There is no identical or equivalent process disclosed by the Boduch patent. To overcome this issue, the Examiner improperly breaks the claim element into two parts; namely, (1) “wherein in response to a data packet being received out of order at a first of the plurality input ports,” and (2) “data packets received at the first input port are discarded for a period of time.” The Examiner gives no weight or meaning to the phrase “first input ports” that provide some measure of specificity to the claimed limitation and structurally link the phrase “wherein in response to a data packet being received out of order at a first of the plurality input ports,” to the phrase “data packets received at the first input port are discarded for a period of time” to form thereby the claim element “wherein in response to a data packet being received out of order at a first of the plurality input ports, data packets received at the first input port are discarded for a period of time.” With respect to the instant claims, the context and proper interpretation of the initial claim term is simply lost using this analysis technique. Taken to an extreme, a claim term may be broken into individual letters, which letters are likely present in any reference. The presence of the individual letters in a reference does not mean that the initial claim term has been disclosed or suggested. All words in a claim must be considered in judging the patentability of that claim against the prior art. See MPEP §2143.03. One cannot divine claim meaning in a vacuum. *Philips v. AWH Corporation* 415 F.3d 1303, 75 USPQ2d 1321(Fed. Cir. July 12, 2005). Accordingly, the cited Boduch’s passage is misconstrued such that it can be equated to Appellants’ claimed feature.

Second, as articulated above when and if Boduch drops a cell, it is because of bad data as opposed to the source from which the data packets originate as claimed in Appellants’ claim 1. (emphasis added).

A bad cell does not contribute to data integrity, therefore, a bad cell that is dropped would not be reused again. Boduch specifically addresses this issue stating:

“When the best cell can be selected from redundant cell streams and can be inserted into the outgoing data stream and sent on to a customer network, data integrity is ensured while the ordered nature of the cell stream is maintained.” col. 3, lines 22-26.

Appellants have thus shown that there are missing claimed features not taught/suggested by the cited reference – including “wherein in response to a data packet being received out of order at a first of the plurality input ports, data packets received at the first input port are discarded for a period of time” – and thus, independent claim 1 has been erroneously rejected under 35 U.S.C. §102(e).

Next, the Examiner contends that Boduch teaches the claimed limitation: “and further allow less a number of bits to be forwarded than were transmitted.” Appellants urge to the contrary. The Examiner cites a litany of passages in an attempt to support that posture. However, Appellants cannot discern any passage that can fairly support this proposition. Boduch teaches away from having less number of bits sent to the customer’s network. As articulated above, Boduch specifically discloses:

“If a cell is missing from all the multiple redundant switch network copies, idle bytes are used to compensate for the missing data. See col. 2, lines 44-46. (emphasis added).

This notion is repeated throughout Boduch. For example, in col. 4, lines 33-40, Boduch discloses:

“If any cells required to construct the outgoing data stream are missing from both networks, the best cell copy selection ASIC 110 inserts idle filler bytes, consisting, for example, of alternating ‘1’ and ‘0’s, to compensate for the missing data.”

The Examiner might well endeavor to justify this rejection, however, Boduch does not provide the necessary alibi.

Next, on page 25 the Examiner states: “In response to Appellants argument on subsection (ii) and (v) that the references fail to show certain features of Appellants invention, it is noted that the features upon which Appellants relies [sic](i.e., (1)...(2)...(3) allow fewer bits to be forwarded than were transmitted) are not recited in the rejected claim(s).

The Examiner earlier (top of page 25 of Examiner’s Answer) asserts that Boduch teaches the claimed limitation: “and further allow less a number of bits to be forwarded than were transmitted,” now the same Examiner argues to the contrary. The Examiner concluded by stating that: “Thus, arguments based on limitations that are not disclosed in

the BROAD claimed invention is [sic] irrelevant.” The claimed limitation is positively recited in the claim and should be accorded proper attention.

Next, the Examiner at first adopts the position that Boduch discloses the claimed limitation: “and further allow less of a number of bits to be forwarded than were transmitted.” The Examiner provided a litany of citations purporting to support the rejection followed by comments. (See top of page 25 of Examiner’s Answer). Then the Examiner concluded: “Thus, it is clear that Boduch clearly discloses the Appellants broadly claimed invention.” The next sentence states: “In response to Appellants argument on subsection (ii) and (v) that the references fail to show certain features of Appellants invention, it is noted that the features upon which Appellants relies [sic] (i.e., (1).....and (2)...(3) *allow fewer bits to be forward [sic] than were transmitted*) are not recited in the rejected claim(s).” Appellants respectfully submit that these two positions are irreconcilable. If the claimed limitation is not recited in the claim, then it is inconceivable that Boduch can teach that same claimed limitation. The issue is further complicated when the Examiner injects into the mix arguments Appellants made in overcoming 35 U.S.C. §112, first paragraph rejection. On page 26 of the Examiner’s Answer, the Examiner writes: “In response to Appellants argument on subsection (ii), Appellants admits [sic] on the record (in an attempt to overcome 35 USC 112, first paragraph rejection) that such claimed invention limitations are well known in the art. In particular, per Appellants remark, page 6, filed 3-27-09, which states “*allow less of a number of bits to be forwarded than were transmitted*” is disclosed as “*data packets 1, 2, 3, 4 were originally transmitted, however, only data packet packets 1, 3, 4 arrives [sic] at destination B*” which is well known in the art. Additionally, Appellants also admits [sic] that the invention is well known in the art since “There is no experimentation required by the average individual because an artisan of ordinary skill in the art would easily comprehend the above-referenced disclosure. Without a reasonable basics [sic] of questioning the adequacy of disclosure to enable a person of ordinary skill in the art to make and use the claimed invention.”

Appellants carefully reviewed the 3-27-09 response to ascertain the reasonableness of above statements. It is not clear how the Examiner arrives at such conclusion, however, what is increasingly clear is the Examiner’s desperate attempt to

cling to an incorrect original position in the face of convincing arguments dislodging the premises upon which such incorrect position rests.

Appellants respectfully submit that the Examiner compensates for gaps and ambiguities in the teachings of the prior art by resorting to a tenuous notion of “Admission” by referring to a previous response. Page 6 of the 3-27-09 addressing the 112 first issue is reproduced here to dispel this notion of Admission fabricated by the Examiner.

“Claims 1-16 are rejected under 35 U.S.C. §112, ¶1, as failing to comply with the written description requirement. In an attempt to support the rejection, the examiner alleges: “In general, nowhere in the original disclosure discloses the newly added limitation discloses the newly added limitation as set forth above. In particular, neither FIG. 10 nor corresponding recitation discloses this newly added limitation either. First, by only disclosing ‘discarding out of order packets’ in the original specification is not sufficient to provide enabling support for ‘allow less of a number of bits to be forwarded than were transmitted.’” See Office Action, page 8. Applicants respectfully disagree. The Examiner’s attention is directed to page 2 of the last response filed with the USPTO on December 2, 2008. Applicants therein indicated that support for the amendment is found on page 6, lines 16-18. This passage is reproduced here for ease of reference. *“Discarding a data packet implies not accepting the arrival of a data packet. It follows that data packet 4 is not discarded and is forwarded by switch S2 towards destination address B, finally leading to the arrival of data packets 1, 3 and 4 at destination address B as shown in figure 7.”* Applicants note that data packets 1, 2, 3, 4 were originally transmitted, whereas, only data packets 1, 3, 4 arrive at the destination. (See FIG. 1 and pp. 5-6, line 25-line 19 of the specification). This passage clearly discloses the claimed feature.

When basing a rejection on the failure of the applicant’s disclosure to meet the enablement provisions of the first paragraph of 35 U.S.C. §112, USPTO personnel must establish on the record a reasonable basis for questioning the adequacy of the disclosure to enable a person of ordinary skill in the art to make and use the claimed invention without resorting to undue experimentation. See *In re Brown*, 477 F.2d 946, 177 USPQ 691 (CCPA 1973). MPEP 2162.01(III). The linchpin of 112 first paragraph is “undue experimentation.” The Examiner was unable to articulate a reasonable basis, because no experimentation is required in order to make and use the present invention. The disclosure makes it clear that data packets 1, 2, 3, 4 were originally transmitted, however, only data packets 1, 3, 4 arrive at destination B. There is no experimentation required by the average individual because an artisan of ordinary skill in the art would be easily comprehend the above-referenced disclosure. Without a reasonable basis for questioning the adequacy of the disclosure to enable a person of ordinary skill in the art to make and use the claimed invention without resorting to undue experimentation, the rejection must be withdrawn.

Furthermore, the Examiner added “Second, if less of a number of bits are forwarded than were transmitted, then the transmission of such partial bits would be erroneous and incomplete since the number of originally transmitted bits and the number forwarded of bits will no longer being the same.” In the instant

application, the network comprises at least two mutually different routing paths between the source and the switch, wherein the switch comprises two incoming ports for receiving data packets originating from the source. Although the Examiner claims it would be erroneous in reference to the instant application, however, the same Examiner, asserts that Boduch discloses the same limitation. (See Office Action, page 3)."

Next, on page 27 of the Examiner's Answer, the Examiner states: "Thus, it is clear that Appellants is [sic] switching the position on every instant of the prosecution. Thus such arguments presented by the Appellants based on uncertain Appellants position are clearly an error." Appellants are unable to respond to this assertion due to its opaqueness.

CONCLUSION

Thus, for the reasons advanced above and in Appellants' Brief, Appellants respectfully submit that all of the claims presently in the application are allowable.

For the reasons advanced above, Appellants respectfully urge that the rejection of claims 1-16 is improper. Reversal of the rejection of the Final Office Action is respectfully requested.

Respectfully submitted,



Dated:

Eamon J. Wall
Registration No. 39,414
Wall & Tong, L.L.P.
595 Shrewsbury Ave. Suite 100
Shrewsbury, NJ 07702
Telephone: (732) 842-8110 X120
Facsimile: (732) 842-8388
Attorney for Appellant(s)